

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

November 20, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3400

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. JAMES D. FOX,

PETITIONER-APPELLANT,

V.

JEFFREY P. ENDICOTT,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
LEWIS W. CHARLES, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. James D. Fox appeals from an order denying his petition for a writ of certiorari. The issue is whether there is substantial evidence to support the Columbia Correctional Institution disciplinary committee's decision to find him guilty of disobeying orders and refusing to work. We conclude that there is substantial evidence to support the decision. Therefore, we affirm.

The conduct report alleged that Fox was ordered to work. When he refused, he was told that he had to work or receive a conduct report. Fox replied, "I'll take the ticket." Fox was charged with disobeying orders and refusing to work, contrary to WIS. ADM. CODE §§ DOC 303.24 and 303.61. Fox's defense was that he was medically unable to work because he has back problems and swollen ankles. His advocate reviewed his medical records and discovered that Fox had been examined by the medical staff in four correctional institutions and was "screened as fit for any type of duty with no restrictions." Fox's advocate also reported that Fox had told him "that he was not sent to prison to work [but] rather for treatment and even if he was in good health he would not work. ... [Fox] stated that he did not care if he spent his entire time in the segregation unit, he has no intentions of working." Fox refused to attend the hearing.

The disciplinary committee considered the conduct report and the report of Fox's advocate, and found that Fox, who did not testify, was guilty of both offenses. Fox petitioned the trial court for a writ of certiorari to challenge that decision. The trial court reviewed the record and concluded that the due process hearing requirements had been met and that the decision was supported by substantial evidence. It affirmed the disciplinary decision and denied the petition. Fox appeals.

We review a correctional institution's disciplinary proceeding against an inmate by common law certiorari. *See State ex rel. Johnson v. Cady*, 50 Wis.2d 540, 549-50, 185 N.W.2d 306, 311 (1971) (footnote omitted). On certiorari, the reviewing court is limited to determining:

- (1) whether the [committee] kept within its jurisdiction;
- (2) whether the [committee] acted according to law;
- (3) whether the [committee's] actions were arbitrary, oppressive or unreasonable and represented its will and not

its judgment; and (4) whether the evidence was such that the [committee] might reasonably make the order or determination in question.

Von Arx v. Schwarz, 185 Wis.2d 645, 655, 517 N.W.2d 540, 544 (Ct. App. 1994) (citation omitted). Fox has the burden of proving that the committee's action was arbitrary and capricious. If that burden is not met, the reviewing court will not interfere with the committee's decision. See *Johnson*, 50 Wis.2d at 549-50, 185 N.W.2d at 311 (citation omitted). The appellate court reviews the committee's record independently of the trial court's review of that same record. See *Gordie Boucher Lincoln-Mercury Madison, Inc. v. Madison Plan Comm'n*, 178 Wis.2d 74, 84, 503 N.W.2d 265, 267 (Ct. App. 1993).

Fox's appellate claims are that: (1) his medical condition prevented him from unrestricted work assignments; (2) the alleged offenses were designed to diminish his chances of parole and to obtain treatment; and (3) his advocate betrayed him.¹ These claims challenge the substantiality of the evidence supporting the disciplinary committee's decision.

Substantial evidence is described as "whether reasonable minds could arrive at the same conclusion reached by the [committee]." *State ex rel. Palleon v. Musolf*, 120 Wis.2d 545, 549, 356 N.W.2d 487, 489 (1984). According to the substantial evidence test, the court is not permitted to evaluate credibility or to weigh the evidence. The court examines the decision only to determine whether

¹ On the medical claim, Fox attaches excerpts from his medical records which mention that he reported having back problems and that his ankles were swollen. These excerpts do not refute that the medical staff in all four correctional institutions had "screened [him] as fit for any type of duty with no restrictions." Fox offers no record citations to verify the other two claims. Fox alleges facts in his brief which are not in the record. We are precluded from considering matters which are not in the record. See *State ex rel. Irby v. Israel*, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980).

it is supported by substantial evidence. *See Robertson Transp. Co. v. Public Serv. Comm'n*, 39 Wis.2d 653, 658, 159 N.W.2d 636, 638 (1968).

Fox had been ordered to work by a correctional institution staff member. Fox refused. Although unnecessary to the findings of guilt, the staff member warned Fox of the consequence of his refusal and Fox affirmatively acknowledged his preference to accept that consequence, rather than to obey the order to work. We have independently reviewed the record and conclude that the conduct report and the report of Fox's advocate constitute substantial evidence of his guilt for disobeying orders and refusing to work.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

